

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-cv-329-GKF(PJC)
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

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**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION  
TO "DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON  
COUNTS 7 & 8 OF THE SECOND AMENDED COMPLAINT [DKT #2057]"**

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Plaintiff, the State of Oklahoma ("the State"), respectfully requests that "Defendants' Joint Motion for Summary Judgment on Counts 7 & 8 of the Second Amended Complaint [DKT #2057]" be denied in its entirety.

# **I. Introductory Statement**

Defendants seek summary judgment on Counts 7 and 8 of the State's Second Amended Complaint (SAC) arguing that: (1) the Oklahoma statutes prohibiting runoff and pollution to the waters of the State do not apply to them; (2) they are not liable for the acts of their growers under these Oklahoma statutes because these acts are permitted, approved or authorized; and (3) the State cannot establish the elements of the violations of these Oklahoma statutes. Each of Defendants' arguments fails.

**First**, Defendants so control their growers that the law views these growers as Defendants' employees / agents. As such, Defendants are not only liable for their own acts, but also the acts of their growers under the State's claims brought pursuant to the Registered Poultry Feeding Operation Act ("RPFO Act") and its regulations (Count 8). On this same basis, Defendants are liable for the State's statutory claims brought in Count 7. Additionally, because the creation of a nuisance was a foreseeable consequence of their contracts with their growers, Defendants are also liable under Count 7 pursuant to Restatement (Second) Torts, § 427B.

**Second**, Defendants' argument that there can be no liability under Counts 7 and 8 because the State permits, approves or authorizes specific land applications of poultry waste fails because it rests on a wholly false premise. The State does not permit, approve or authorize specific land applications of poultry waste and prohibits pollution of its waters by such waste.

**And third**, Defendants' argument that the State cannot establish elements of certain of its statutory violations is premised on illogical and flawed interpretations of the relevant statutory

and regulatory language. Moreover, there is specific evidence of violations of the statutes at issue by Defendants.

## **II. Disputed Material Facts**

1. Not Disputed.
2. Disputed. Many contract growers in the IRW are corporate entities. *See, e.g.*, Dkt. 2125-2 (filed under seal). Moreover, to the extent that Defendants are asserting by this disputed fact, and the disputed facts that follow, that the contract growers are independent, that assertion is disputed. Defendants exercise control over their contract growers and all essential aspects of poultry production. *See* Dkt. 2065-4 (Taylor P.I. Test., pp. 929-35, 940-44); Ex. 1, (Taylor Aff. ¶¶ 9-40); Dkt. 2119-24 (2001 Atty. Gen. Op. 17, ¶ 11). Defendants own the birds, *see* Dkt. 1236 at ¶ 37; Dkt. 1237 at ¶ 37; Dkt. 1238 at ¶ 37 ("usually retain title"); Dkt. 1239 at ¶ 37; Dkt. 1241 at ¶ 37; Dkt. #1243 at ¶ 37; own and supply the feed that the birds eat, *see* Dkt. 2065-18 (Storm Dep., pp. 47-48); Dkt. 2065-7 (McClure Dep., pp. 135-36); 2066-5 (Maupin Dep., pp. 142-43); Dkt. 2066-6 (Butler Dep., p. 16); Dkt. 2066-7 (Houtchens Dep., pp. 147-48); Dkt. 2066-3 (Murphy Dep., p. 141); Dkt. 2066-11 (Pilkington Dep., pp. 49-50); Dkt. 2065-12 (Schaffer Dep., p. 14); decide when the birds are delivered, *see* Dkt. 2065-10 (Dicks Dep., p. 116); Dkt. 2065-7 (McClure Dep., p. 134); Dkt. 2066-8 (Schwabe Dep., p. 47); Dkt. 2066-9 (Wear Dep., pp. 26-27); Dkt. 2066-3 (Murphy Dep., pp. 140-41); Dkt. 2065-11 (Pilkington Dep., p. 49); decide the number of birds delivered, *see* Dkt. 2065-10 (Dicks Dep., p. 116); Dkt. 2066-10 (Alsup Dep., p. 261); Dkt. 2066-9 (Wear Dep., p. 26); regularly inspect and supervise the growing operations, *see* Dkt. 2065-10 (Dicks Dep., pp. 118-9); Dkt. 2125-3 at Ex. 4 (Storm Dep., pp. 60-61); Dkt. 2070 (Alsup Dep., pp. 29-31 & 35); Dkt. 2066-5 (Maupin Dep., pp. 150-52); Dkt. 2065-7 (McClure Dep., pp. 136-140); Dkt. 2066-6 (Butler Dep., pp. 21-22); Dkt. 2070-2

(Mullikin Dep., pp. 46-48); Dkt. 2066-3 (Murphy Dep., pp. 132 & 142); Dkt. 2070-3 (Reed Dep., pp. 50-52); Dkt. 2065-11 (Pilkington Dep., p. 50); Dkt. 2070-4 (Pigeon Dep., pp. 65-68); dictate where growing operations are located, *see* Dkt. 2065-10 (Dicks Dep., p. 115); Dkt. 2070 (Alsup Dep., p. 58); Dkt. 2065-7 (McClure Dep., p. 176); Dkt. 2066-7 (Houtchens Dep., p. 30); Dkt. 2066-3 (Murphy Dep., p. 171); Dkt. 2070-5 (Tyson website); and specify poultry house clean-outs / cake-outs, *see* Dkt. 2070 (Alsup Dep., pp. 45-48, 52-53); Dkt. 2066-6 (Butler Dep., p. 25); Dkt. 2070-6 (Williams Dep., pp. 14-15); Dkt. 2070-4 (Pigeon Dep., p. 75); Dkt. 2066-3 (Murphy Dep., p. 199); Dkt. 2125-4 (at TSN0039CORP); Dkt. 2125-5 at Ex. 23 (at TSN0138CORP); Dkt. 2125-5 at Ex. 24 (at TSN0273CORP); Dkt. 2125-6 (at PFIRWP-000604) (filed under seal); Dkt. 2125-7 (at CARTP000391-392) (filed under seal); Dkt. 2125-8 (at GE-HB 0024); Dkt. 2125-9 at Ex. 28 (collective exhibit of George's, Tyson, Peterson & Simmons flock service reports specifying clean outs / cake outs); Ex. 2 (Cargill service reports)(to be filed under seal). The flock-to-flock structure of the grower contracts underscores Defendants' control, as Defendants can decline to deliver new birds to a grower. *See* Dkt. 2065-4 (Taylor P.I. Test., pp. 933-35). Defendants' contracts with the growers are generally non-negotiable. *See* Dkt. 2065-4 (Taylor P.I. Test., p. 940); Dkt. 2065-18 (Storm Dep., p. 55); Dkt. 2066-5 (Maupin Dep., p. 21); Dkt. 2070-6 (Williams Dep., p. 14); Dkt. 2065-7 (McClure Dep., p. 133); Dkt. 2066-9 (Wear Dep., pp. 39 & 56); Dkt. 2066-3 (Murphy Dep., p. 230); Dkt. 2065-11 (Pilkington Dep., p. 21). In sum, Defendants have oligopsony power over the growers. *See* Dkt. 2065-4 (Taylor P.I. Test., pp. 941-43); Dkt. 2070-7 (Taylor Dep., p. 29). Defendants' grower contracts, with the exception of Peterson's since 1999 and Simmons' since 2008, do not transfer ownership of the poultry waste to the growers. *See* Resp. to Facts, ¶ 9. However, Peterson's and Simmons' contracts with their growers are non-negotiable -- even as to responsibility for poultry waste. *See*

Resp. to Facts, ¶ 9. And, as shown by the *City of Tulsa* settlement, Defendants can control the growers and the disposal of the poultry waste. *See* Dkt. 2070-10 (Tolbert P.I. Test., pp. 94-95); Dkt. 2070-11 (at pp. 8-9).

3. Disputed. The State does not dispute that "all of Defendants in this action" are poultry integrators or that the State has not named Defendants' contract growers as Defendants in this action. However, while the terms "integrator" and "contract poultry grower" are separately defined under 2 Okla. Stat. §§ 10.9.1(B)(8) and (13), where the integrator so controls the contract poultry grower such that the contract poultry grower is the integrator's employee or agent (as is the case here), *see* Resp. to Facts, ¶ 2, then the integrator becomes liable for the actions of the grower.

4. Disputed. The State does not dispute the general proposition set forth about Defendants' activities, but disputes that Defendants' involvement in the growing process is limited to these activities. Defendants' involvement and control is far more extensive. *See* Resp. to Facts, ¶ 2.

5. Disputed. Poultry at Defendants' own operations in the IRW are raised in houses with equipment owned by those Defendants. *See, e.g.*, Dkt. 2065-13 (Patrick Dep., pp. 36-38).

6. Disputed. Some Defendants provide the bedding material used by their contract growers. *See, e.g.*, Defs.' MSJ Ex. 2 (at TSN59500SOK); Defs.' MSJ Ex. 7 (at CARTP172228).

7. Disputed. Poultry litter, also known as poultry waste, consists of poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation. *See* 2 Okla. Stat. § 10-9.1(B)(21). Poultry waste also includes its constituent parts. For instance, poultry waste contains large amounts of phosphorus. *See* Dkt. 2076-12 (at p. 3); Dkt. 2077-2 (at PIGEON.0643). It also contains the pathogenic



bacteria *E. coli*, *Salmonella* and *Campylobacter*, *see* Dkt. 2126-5 at Ex. 35 (Teaf P.I. Test., pp. 205 & 207); Dkt. 2126-5 at Ex. 36 (Lawrence P.I. Test., pp. 1169-70); Dkt. 2126-5 at Ex. 37 (Harwood P.I. Test., p. 642), which can cause illness in humans. *See* Dkt. 2126-5 at Ex. 36 (Lawrence P.I. Test., p. 1193); Dkt. 2126-5 at Ex. 37 (Harwood P.I. Test., p. 640); Dkt. 2126-5 at Ex. 38 (State's P.I. Exhibit 404).

8. Disputed. Defendants specify clean-outs and cake-outs of the poultry houses. *See* Resp. to Facts, ¶ 2.

9. Disputed. Defendants' contracts with their growers, with the exception of Peterson's contracts since 1999 and Simmons' contracts since 2008, do not transfer ownership of the poultry waste to the growers. *See* Dkt. 2065-4 (Taylor P.I. Test., p. 938); Dkt. 2070-7 (Taylor Dep., pp. 132-34); Dkt. 2070-8 (Taylor Aff., ¶ 15); Defs.' MSJ Exs. 4 & 5. With respect to Peterson and Simmons, their contracts with their growers are non-negotiable, *see* Dkt. 2066-9 (Wear Dep., pp. 39 & 56-57) & Dkt. 2066-3 (Murphy Dep., p. 230), even as to responsibility for poultry waste. *See* Dkt. 2066-9 (Wear Dep., pp. 39 & 56-57); Dkt. 2070-7 (Taylor Dep., p. 55-56). Moreover, Peterson's employee assigned to environmental issues has written that he believed that irrespective of ownership, poultry integrators would be found liable for the effect it has on the environment. *See* Dkt. 2070-9 (3/27/98 Mullikin memo). Finally, neither the affidavits nor the testimony cited state that the contract growers own the poultry waste. *See also*, Resp. to Facts, ¶ 2.

10. Disputed. *See* Resp. to Facts, ¶¶ 2, 9 & 11.

11. Disputed. Defendants' conduct influences the timing, location and amount of poultry waste that is land applied in the IRW. Defendants dictate where the growing operations are located, *see* Resp. to Facts, ¶ 2, thus influencing where poultry waste is disposed of by land

application (*i.e.*, most of the poultry waste generated by Defendants' birds is land applied in very close proximity to where it is generated). *See also* Dkt. 2081-12 (Engel P.I. Test., pp. 446-67); Dkt. 2076-5 (Fisher Aff. 1, ¶ 5). Defendants decide when the birds are delivered, *see* Resp. to Facts, ¶ 2, and specify clean-outs and cake-outs of the poultry houses, *see* Resp. to Facts, ¶ 2, thus influencing when poultry waste is disposed of through land application. *See also* Dkt. 2076-3 (Fisher P.I. Test., p. 416). And Defendants have concentrated poultry growing operations in the IRW, *see* Dkt. 2088-6 (Fisher Aff. 3, ¶ 3), and decide the number of birds delivered to those operations, *see* Resp. to Facts, ¶ 2, thus influencing the amount of poultry waste generated that is disposed of by land application in the IRW. *See also*, Resp. to ¶ 2. Finally, as shown by the *City of Tulsa* settlement, Defendants can and have controlled the disposal of the poultry waste. *See* Resp. to Facts, ¶ 2.

12. Disputed. Defendants' conduct influences the timing and amount of poultry waste generated, and hence that can be transferred, in the IRW. *See* Resp. to Facts, ¶¶ 2 & 11

13. Not Disputed.

14. Disputed. *See* Resp. to Facts, ¶¶ 2, 8, 9, 11 & 12.

15. Disputed. Poultry waste is not being used as fertilizer in the IRW. *See* Resp. to Facts, ¶¶ 16. Moreover, the exhibits do not support the proposition for which they are cited. Defendants' exhibits 13 and 14 do not reflect that poultry waste was sold or given away, that if it was sold or given away, how much and to whom, or the amount of poultry waste that might be land applied by third persons. In any event, that the enormous amounts of poultry waste generated by Defendants' birds raised in the IRW are land applied in the IRW is both the foreseeable and intended means by which the poultry waste is disposed of. *See* Dkt. 2076-12 (p. 14); Dkt. 2081-3 (p. TSN0076CORP); Dkt. 2081-4 (Chaubey Dep., p. 32-33); Dkt. 2081-5

(12/5/04 advertisement); Dkt. 2081-6 (9/10/04 advertisement); Dkt. 2065-10 (Dicks Dep., p. 194); Dkt. 2081-7 (Ryan P.I. Opening., p. 46).

16. Disputed.<sup>1</sup> Poultry waste is not well-balanced in nutrients and is not a good fertilizer or soil conditioner. *See* Dkt. 2076-9 (Johnson P.I. Test., pp. 489-91); Dkt. 2088-9 (Johnson Rpt., ¶ 6(c)). Moreover, land-applied poultry waste is not incorporated into the soil by tilling, thus putting it in a circumstance where it may be more readily transported. *See* Dkt. 2076-2 (Fisher Dep., pp. 156-57); Dkt. 2076-11 (Daniel Dep., p. 27).

17. Disputed. Poultry waste is not an effective fertilizer or soil conditioner. *See* Resp. to Facts, ¶ 16. While the State regulates poultry waste application state-wide, it does not encourage the land application of poultry waste in the IRW. Okla. Admin. Code § 785:45-5-29 and 2 Okla. Stat. § 10-9, *et seq.*; Dkt. 2081-8 (Gunter Dep., pp. 175-79, 180-81); Dkt. 2081-9 (Parrish Dep., pp. 140, 152-53); Dkt. 2081-11 (Strong Dep., pp. 211, 220, 245). Oklahoma had to create a mechanism to move poultry waste from areas where concentrated poultry waste production created environmental concerns. *See* Defs.' Ex. 10 to DKT #2050-12; *see also*, Dkt. 2125-9 at Ex. 30 (Tolbert P.I. Test., p. 91). Moreover, the State requires that Poultry waste handling, treatment, management and removal not create an environmental or public health hazard and not result in contamination of waters of the state, and prohibits runoff from land application sites. *See* 2 Okla. Stat. § 10-9.7; *see also* Ex. 2119-8 (Gunter Dep. pp. 168); *see also* Resp. to Facts, ¶ 19.

18. Disputed. *See* Resp. to Facts, ¶ 19.

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<sup>1</sup> Defendants have attached an excerpt of Dr. Clay's unsworn expert report in support of this proposition. Unsworn expert reports are not admissible under Rule 56(e) to support or oppose summary judgment. *See Sofford v. Schindler Elevator Corp.*, 954 F. Supp. 1459, 1463 (D. Colo. 1997). This report, and all other unsworn expert reports submitted by Defendants, should not be considered.

19. Disputed. Oklahoma registers poultry feeding operations under the Oklahoma Registered Poultry Feeding Operations Act ("RPFO Act"). *See* 2 Okla. Stat. § 10-9.3. It also requires certification of waste applicators, and requires them to have a license. *See* 2 Okla. Stat. § 10-9.17; *see* Dkt. 2119-9 (Parrish Dep. pp. 13-15). It *does not* issue permits, authorizations or approvals for the land application of poultry waste, and AWMPs and NMPs are not permits, authorizations or approvals. *See* 2 Okla. Stat. § 10-9, *et seq.*; *see also*, Dkt. 2119-8 (Gunter Dep., pp. 175-79 & 180-81); Dkt. 2119-9 (Parrish Dep., pp. 140 & 152-53); Dkt. 2119-4 (Tolbert Dep., p. 222); Dkt. 2119-10 (Strong Dep., pp. 211, 220 & 245); Ex. 3 (Gunter Dep. pp. 81- 83, 243-44); Ex. 4 (Parish Dep. pp. 64-65); Ex. 5 (Littlefield Dep. p. 107). These statutes and regulations were enacted *because* of the land application of poultry waste. *See* Dkt. 2119-9 (Parrish Dep., p. 60). The presence of an AWMP or NMP does not ensure compliance with Oklahoma's statutory requirements, *see* Dkt. 2119-8 (Gunter Dep., pp. 175-79 & 180-81); Dkt. 2119-9 (Parrish Dep., pp. 140 & 152-53); Dkt. 2119-10 (Strong Dep., pp. 211 & 220), as poultry waste may be applied in a manner that is consistent with an AWMP or NMP and runoff can still result, especially in the IRW. *See* Dkt. 2119-8 (Chaubey Dep. p. 168); Dkt. 2119-9 (Parrish Dep. p. 94); Dkt. 2103-4 (p. CARTP 000009 [filed under seal]).

20. Disputed. The RPFO Act and corresponding administrative rules have been applied to Defendants and other integrators. For example, the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF") has issued fines to George's for improper waste disposal and cited Tyson Foods for failure to update its animal waste management plans. *See e.g.* Ex. 3 (Gunter Dep., p. 47-49 & Dep. Exs. 20, 21, 23 (excerpts)).

21. Disputed. The laws in Oklahoma are directed to persons or entities who participate in poultry growing operations. *See* Dkt. 2119-9 (Parrish Dep. pp. 24-26). Defendants

may own and operate their own growing facilities in the IRW. *Id.* Moreover, Defendants exercise control over the essential aspects of the poultry growing operations in the IRW. Therefore, their contractor growers are in fact their employees or agents, thereby making them part of the regulatory system. *See* Dkt. 2065-4 (Taylor P.I. Test. pp. 929-35, 940-44); Ex. 1, (Taylor Aff. ¶¶ 9-40; Dkt. 2119-24 (2001 Atty. Gen. Op. 17, ¶ 11); Dkt. 2119-9 (Parrish Dep. pp. 33-35). *See also* Resp. to Facts, ¶ 20.

22. Disputed. *See* Resp. to Facts, ¶¶ 20 & 21. Additionally, in this action the State is applying the RPFO Act to Defendant integrators pursuant to 2 Okla. Stat. § 10-9.11(C)(1)(b).

23. Disputed. *See* Resp. to Facts, ¶¶ 20 & 21.

24. Disputed. The testimony cited does not stand for the proposition that poultry waste is or has been applied consistent with Oklahoma and Arkansas law. Rather this testimony is simply a collection of deposition snippets from witnesses who *are not aware* of violations of law -- a far different proposition from testimony that Defendants and their contract growers are acting in compliance with the law. *See, e.g.,* Ex. 4 (Parrish Dep., pp. 14, 19, 199 & 258) (repeatedly testifying that ODAFF does not have the resources to know if there are violations of the RPFO Act). In any event, Defendants do not begin to meet their burden of proving that the approximately 345,000 tons of waste generated annually are all disposed of in compliance with the law. Defendants have no idea the circumstances under which poultry waste from their birds is land applied in the IRW. *See* Dkt. 2099-4 (at resp. #1 & #2); Dkt. 2065-6 (Cal-Maine 30(b)(6) Dep., p. 221); Dkt. 2099-5 (at resp. #1 & #2); Dkt. 2099-6 (at resp. #1 & #2); Dkt. 2099-7 (at resp. #6); Dkt. 2099-8 (Cargill 30(b)(6) Dep., p. 230); Dkt. 2070 (Cargill 30(b)(6) Dep., p. 84); Dkt. 2099-9 (at resp. #1). Finally, Defendants have admitted to over-application of poultry waste. *See* Dkt. 2081-7 (Ryan Opening, P.I. Tr., p. 46). Compliance with Oklahoma law

requires no run-off of poultry waste and no pollution of the waters of the State. *See* 2 Okla. Stat. § 10-9.7. The fact of the matter is that poultry waste is running off and polluting the waters of the State -- *per se* evidence that poultry waste is not being applied consistent with Oklahoma law. *See* 2 Okla. Stat. § 10-9.7; Dkt. 2103-13 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16); Dkt. 2088-11 (Chaubey Dep. p. 168); Dkt. 2081-9 (Parrish Dep. p. 94); Dkt. 2103-4 (p. CARTP 000009 [filed under seal]); State's Motion for Partial Summary Judgment, Dkt. # 2062, Fact ¶ 48.

25. Disputed. The State *does not* issue permits, authorizations or approvals for the land application of poultry waste, and Animal Waste Management Plans ("AWMPs") and Nutrient Management Plans ("NMP") are not permits, authorizations or approvals. *See* Resp. to Facts, ¶ 19. Additionally, Defendants have admitted to over-application of poultry waste. *See* Dkt. 2081-7 (Ryan Opening, P.I. Tr., p. 46). Compliance with Oklahoma law requires no run-off of poultry waste and no pollution of the waters of the State. *See* 2 Okla. Stat. § 10-9.7. The fact of the matter is that poultry waste is running off from land-applied fields and polluting the waters of the State -- *per se* evidence that poultry waste is not being applied consistent with Oklahoma law. *See* 2 Okla. Stat. § 10-9.7; Dkt. 2103-13 (Water Quality in Oklahoma -- 2008 Integrated Report, pp. 7, 55-56, App. B pp. 32-36, App. C pp. 15-16); Dkt. 2084 (USDA Report, pp. 18-19) ("Water quality problems in the Tenkiller and Spavinaw watersheds are due to excess nutrients, pathogenic bacteria, and sedimentation. These watersheds are major poultry growing and cattle producing areas, and a common practice has been to fertilize the soil for grazing purposes by applying poultry litter. This practice has led to the excessive buildup of phosphorus that currently pollutes waterbodies in the ROI [Region of Influence]"); *id.* (at p. 40) ("The number one cause of water impairments within the ROI is excessive nutrient loading (EPA 2002a). This

is due in large part to the practice of fertilizing grazing land by applying poultry litter"); *id.* (at p. A-5) ("The watersheds of Spavinaw and Tenkiller Lakes constitute a major poultry growing and cattle producing area. Poultry litter has been applied to the nutrient poor, thin, cherty soils of the area . . . . Excessive buildup of phosphorus over the years has polluted the receiving waterbodies to the point that they are now considered impaired by nutrients. The Illinois River is impaired by phosphorus and many of the area streams are impaired by pathogenic bacteria"); Dkt. 2101, 2101-2 (USDA Report, p. 32) ("A significant part of the water quality problems in the basin appear to be a precipitate of the large volume of poultry waste generated and disposed of in the basin each year. . . . Nutrients from animal wastes and other sources enter water courses via leaching through the soil or by surface runoff from land applied waste"); Dkt. 2102 (USGS Report, p. 61) ("Production of large numbers of poultry, cattle, and swine in northwestern Arkansas, and increasingly in southwestern Missouri and northeastern Oklahoma, is contributing to elevated nutrient and bacteria concentrations in streams"); Dkt. 2102-4 (OSE Report, p. 4) ("The single largest contributor of nonpoint source phosphorus pollution is surplus poultry litter generated by the integrators' flocks"); Dkt. 2100-5 (Smolen Dep., pp. 138-39) (testifying that it would be the consensus among water quality professionals who have studied the IRW that land-applied poultry waste is the number one source of phosphorus in the waters of the IRW); Dkt 2103-2 (Derichsweiler Dep., pp. 56-57 & 60) (testifying that poultry litter is the largest contributor to the phosphorus loading in Lake Tenkiller and that poultry litter is a contributor to the phosphorus levels in the streams of the IRW); Dkt. 2081-5 (12/5/04 advertisement by several Defendants stating: "Lately, a good deal of concern has been raised about the effect of excess nutrients on the land and waters of Eastern Oklahoma. . . . Nutrients can come from many sources, one of which is the use of poultry litter as an organic fertilizer. . . "); Dkt. 2081-6 (9/10/04

advertisement by several Defendants stating: "[W]e have been working with the State of Oklahoma on a multi-million-dollar voluntary proposal to improve the management of poultry-related nutrients that might find their way into Eastern Oklahoma's Scenic River Watersheds. . . . We are prepared to do our part to take care of the poultry portion of the nutrient equation"); Dkt. 2103-11 (Caneday PI Test., pp. 597-99) (testifying to poultry waste run-off). *See also* Resp. to Facts, ¶¶ 2, 3, 11-12, 15, 19-21 & 24.

26. Disputed. *See* Response to Facts, ¶ 25. In addition to the facts set forth in the State's Response to Facts, ¶ 25, ODAFF has cited Defendants' growers for violations of the RFPO Act and its regulations. *See e.g.* Ex. 6 (ODAFF Correspondence fining Juanita Loftin (Simmons grower) and Judy Noblin (Tyson grower); Ex. 7 (correspondence to Cargill grower Ernest Doyle informing him he should not have applied any additional waste to his field); Ex. 3 (George's waste application violations)(Gunter Dep., p. 47-49 & Dep. Ex. 20).

27. Disputed. *See* Resp. to Facts, ¶¶ 20, 25, 26 & 20. Additionally, and in any event, the State does not need to identify specific applications of poultry waste to succeed on its claims. Defendants' birds generate an enormous of amount of waste in the IRW, *see* Dkt. 2076-8 (Engel Aff., ¶¶ 6-11), that is applied to IRW land that is highly susceptible to pollution, *see* Dkt. 2081-4 (Chaubey Dep., pp. 32-33); Dkt. 2081-7 (Ryan P.I. Opening, p. 46); Dkt. 2076-5 (Fisher Aff. 1, ¶ 6); Dkt. 2088 (Fisher Aff. 2, ¶¶ 7-27), and that runs off, *see* Dkt. 2088-11 (Chaubey Dep. p. 168); Dkt. 2119-9 (Parrish Dep. p. 94); Dkt. 2103-4 (p. CARTP 000009 [filed under seal]), and causes pollution, *see* resp. to Facts, ¶ 25.

28. Not Disputed. The State is not pursuing Court 8 as it pertains to "discharges" under 2 Okla. Stat. § 10-9.7(B)(1).



29. Disputed. This proposition is a tautology because in order for land application to be in accordance with Oklahoma laws and regulations, poultry waste cannot run-off, pollute the water, or create an environmental or health hazard. *See* 2 Okla. Stat. §§ 10-9.7(B)(4)(a) & (b) & 10-9.7(C)(6)(c). Nor can it be placed or be caused to be placed in a location where it is likely to cause water pollution, *see* 27A Okla. Stat. § 2-6-105(A), or causes pollution, *see* 27A Okla. Stat. § 2-6-105(A) & 2 Okla. Stat. § 2-18-1(A). Nor can it cause a nuisance or trespass. In any event, land-applied poultry waste is resulting in runoff, migration and release of poultry waste from land application sites in the IRW. *See* Resp. to Facts, ¶¶ 24, 25 & 27.

30. Not Disputed.

### **III. The Summary Judgment Standard**

The summary judgment standard is well-established, and is set forth in *Lumpkin v. United States Recovery Systems*, 2009 U.S. Dist. LEXIS 7578, at \*2-3 (N.D. Okla. Feb. 3, 2009).

### **IV. Argument and Authorities**

#### **A. The State does not dispute that its state statutory claims apply only to conduct occurring in Oklahoma**

In light of this Court's June 15, 2007 ruling, the State is not seeking to apply its claim under 27A Okla. Stat. § 2-6-105 (Count 7) to conduct outside the State of Oklahoma.

Accordingly, this portion of Defendants' motion is moot.

#### **B. The Registered Poultry Feeding Operations Act and its regulations apply to Defendants because Defendants control their poultry growers**

Defendants argue that they are entitled to summary judgment on Count 8 -- violations of 2 Okla. Stat. § 10-9.7 & Okla. Admin. Code § 35:17-5-5 -- because they are not "poultry feeding operations" as that term is defined in the RPFO Act. Defendants' argument fails for two reasons. First, Defendants operate or have operated poultry feeding operations in the IRW that they own.

*See* Resp. to Facts, ¶ 5. Obviously, the RPFO Act is applicable to these integrator-owned poultry feeding operations. Indeed, the RPFO Act has been enforced against poultry integrators for violations at their growing operations, and the testimony Defendants cite from Terry Peach specifically explains that the RPFO Act *is* applicable to integrators who operate growing operations. *See* Resp. to Facts, ¶ 20; Motion, p. 14 (citing Peach Dep., Ex. 17).

Second, Defendants' argument fails because Defendants control their growers to such a degree that these growers are Defendants' employees or agents. It is black letter law that where an employer exercises control over the contractor, the employer is liable for the acts of the contractor. *See Page v. Hardy*, 334 P.2d 782, 784-85 (Okla. 1958). Similarly, a principal is liable for the acts of its agent. *See Roring v. Hoggard*, 326 P.2d 812, 814 (Okla. 1958). The State has alleged that the contract growers are the employees and / or agents of Defendants, *see* SAC, ¶¶ 6-12 & 42, and has provided evidence establishing that fact. *See* Resp. to Facts, ¶¶ 2, 6, 8, 9, 11. Thus, Defendants are subject to liability under the RPFO Act for the acts of their growers.

Specifically, Defendants control their growers and all essential aspects of the poultry production process, including, without limitation, everything from determining the timing of the placement of their birds and the number of birds to be placed, to dictating the manner in which the growers will raise the birds, to specifying when the poultry waste in the houses will be clean-out. *See* Resp. to Facts, ¶ 2. Defendants own the birds, and supply the feed and medication, and sometimes even the bedding material. *See* Resp. to Facts, ¶ 2. Defendants' contracts generally do not transfer title to the poultry waste to the growers. *See* Resp. to Facts, ¶ 2. Indeed, as demonstrated by the *City of Tulsa* settlement and its implementation, Defendants can, and have, exercised control over the growers' disposal of the enormous amounts poultry waste that

Defendants' birds generate. *See* Resp. to Facts, ¶ 2. This profound control over the contract growers (including the growers' handling of the waste) establishes that the growers are Defendants' employees or agents. *See Page*, 334 P.2d at 784-85 (outlining factors to be considered in determining whether employer / employee relationship exists). This employer-employee / principal-agent relationship provides the basis of Defendants' liability for violations of the RPFO Act by their growers.<sup>2</sup>

Defendants' argument that as "integrators" as defined in the RPFO Act, the Oklahoma legislature intended to immunize them from liability under the RPFO Act must therefore fail. *See* Motion, pp. 11-14.<sup>3</sup> Had the legislature intended to *immunize* poultry integrators from liability for their growers' conduct under this statute, it could have done so, but it did not. Moreover, Defendants' interpretation of the RPFO Act would lead to results that are in conflict with the purpose of the statute as a whole. *See, e.g., Burns v. United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent"); *E.E.O.C. v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (rejecting an interpretation of statutory language that would lead to "absurd or futile results . . . plainly at variance with the policy of the

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<sup>2</sup> To the extent a grower were to transfer the poultry waste to a third person for land application in the IRW, Defendants would be liable for violations of law arising out of such land application. *See* Discussion, *infra*, pp. 19-21.

<sup>3</sup> Canons of statutory interpretation dictate that one must assume that a legislature recognized existing law, which would necessarily include the well-established "control" exception that underlies the liability doctrine pertaining to contractors who are in fact employees or agents. *See, e.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (explaining that a court must "assume that Congress is aware of existing law when it passes legislation"); *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005) ("It is well-established that 'Congress is presumed to enact legislation with knowledge of the law. The upshot of this canon of statutory interpretation is that absent a clear manifestation of contrary intent, a newly-enacted or revised statute is presumed to be harmonious with existing law'").

legislation as a whole"). Granting Defendants immunity from RPFO Act liability for the acts of grower employees or agents is at odds with the purpose of the Act, which is to prevent pollution.

**C. Liability under Count 7 attaches to Defendants for their own operations, as well as their growers' operations, and it matters not whether the poultry waste is transferred to a third party for land application in the IRW**

Defendants argue they are entitled to summary judgment on Count 7 because "Plaintiffs do not allege -- let alone identify any evidence to prove -- that Defendants actually own the poultry litter, or in any way control or participate in its application to land in the IRW."<sup>4</sup> *See* Motion, p. 15. However, ample evidence shows that Defendants own the poultry waste that their birds generate and control their growers and the disposal of that waste in the IRW. *See* Resp. to Facts, ¶¶ 2, 6, 8, 9, 11 & 12. Thus, control and ownership of poultry waste is a disputed issue, and the State has provided ample evidence in support of its claim.

In addition to Defendants' liability on the basis of "control" (*i.e.*, the employer-employee or principal-agent relationship), Defendants are also liable under 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18-1(A) on the basis of Restatement (Second) Torts, § 427B. 27A Okla. Stat. § 2-6-105(A) sounds in nuisance. Section 427B provides for liability where a defendant is aware or should have been aware that in the ordinary course of a contractor doing contract work a nuisance would be likely to result. Such is the case here: it was and is clearly foreseeable that a violation of 27A Okla. Stat. § 2-6-105(A) will occur in the IRW from Defendants' contract growers' performance of their contract work. *See* Response to Facts, ¶¶ 2, 6, 8, 9, 11, 12, 25 & 27. *See also*, State's Motion for Partial Summary Judgment, DKT #2062 (addressing section

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<sup>4</sup> Defendants have not asserted that they are not liable under Count 7 for poultry waste generated at their own operations that is currently, or was in the past, land applied in the IRW.

427B liability). This would hold true whether the grower applies the poultry waste itself or transfers the poultry waste to a third party, as the nuisance is foreseeable in either instance.

Defendants also argue that even if they do in fact control their growers (which they do), they should be entitled to partial summary judgment "on Count 7 as it relates to the actions of non-Growers." *See* Motion, p. 16. As an initial matter, it should be reiterated that Defendants have not demonstrated the amount of poultry waste that might be being transferred to third parties in the IRW. *See* Resp. to Fact, ¶ 15 (showing that documents relied upon by Defendants do not support proposition stated). Furthermore, even if Defendants' assertions regarding the portion of poultry waste sold or given away were accurate, Defendants are still responsible for ensuring that it is managed responsibly. That the enormous amount of poultry waste generated by Defendants' birds in the Oklahoma portion of the IRW is land applied within the Oklahoma portion of the IRW is foreseeable and intended by the Defendants. *See id.* Therefore, section 427B liability would attach to Defendants for the transferred waste by their growers (who are their employees / agents) to third parties.<sup>5</sup>

In sum, with regard to Count 7, Defendants have liability for land-applied poultry waste under 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18-1(A), not only for poultry waste generated at their own growing operations, but also for waste generated at their contract growers' operations on the basis of "control." Additionally, Defendants have liability under 27A Okla. Stat. § 2-6-105(A) for waste generated at their contract growers' operations on the basis of Restatement (Second) Torts, § 427B. That this waste might be transferred to a third party for application in the IRW is of no consequence because under all of these bases of liability, a

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<sup>5</sup> Defendants persist in their assertion that the State somehow encourages the application of poultry waste in the IRW. The fact is just the opposite -- the State encourages the transfer of poultry waste out of the IRW. *See* Response to Fact, ¶ 17.

nuisance is likely to result and, therefore, Defendants are liable. *See* Restatement (Second) Torts, § 427B.

**D. The State can establish the elements of its claims under Count 7**

Defendants also assert that the State cannot establish the elements of its claims under Count 7 -- violations of 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18-1(A) -- because (1) there is a conflict between 27A Okla. Stat. § 2-6-105(A) & 2 Okla. Stat. § 2-18-1(A) and the RPFO Act, and (2) the compliance with the RPFO Act is an impossibility. These two arguments are premised entirely on the erroneous proposition that the State permits, approves or authorizes specific instances of land application of poultry waste. Once this erroneous premise is put to rest, Defendants' entire argument quickly collapses.

**1. The State does not issue permits, approvals or authorizations for land application of poultry waste**

Defendants' assertion, *see* Motion, p. 17, that Oklahoma law "expressly authorizes farmers and ranchers to apply poultry litter in the IRW" is false and demonstrates a fundamental misunderstanding of the RPFO Act. The State regulates the land application of poultry waste through the RPFO Act in order to *prevent* the pollution that such land application can create. *see* 2 Okla. Stat. § 10-9.1, *et seq.*; *see also, e.g.*, Drew L. Kershner, *The Risks of Going Non-GMO*, 53 Okla. L. Rev. 631, 652 fn. 19 (noting that "Oklahoma was the first state to pass an environmental statute that specifically focused on the poultry industry as a source of pollution"). The centerpiece of the RPFO Act is the requirement that (1) there be no runoff from land-applied poultry waste, *see* 2 Okla. Stat. § 10-9.7(C)(6)(c) ("Discharge or runoff of waste from the application site is prohibited"), (2) land-applied poultry waste not pollute the water or create an environmental or health hazard, *see* 2 Okla. Stat. § 10-9.7(B)(4)(a) & (b) ("Poultry waste

handling, treatment, management and removal shall [] not create an environmental or a public health hazard, [and] not result in the contamination of waters of the state").

As guidance in meeting these requirements, the RPFO Act provides that a poultry feeding operation is required to have an AWMP. *See* 2 Okla. Stat. § 10-9.7(C). An AWMP is "a written plan that includes a combination of conservation and management practices *designed* to protect the natural resources of the state . . . ." *See* 2 Okla. Stat. § 10-9.1(B)(1) (emphasis added). Such conservation and management practices are all subject to the overarching requirement that in *any* application of poultry waste, "[d]ischarge or runoff of waste from the application site is prohibited." *See* 2 Okla. Stat. § 10-9.7(C)(6)(c).

An animal waste management plan is *not* a permit or authorization to land apply poultry waste at any particular location, in any particular amount, or at any particular time. (Nor is it even a permit or authorization to land apply poultry waste generally.) Rather, it is simply a guidance document. This fact was confirmed time and time again in Defendants' depositions of the State's witnesses. *See, e.g.,* Resp. to Facts, ¶ 19 (Dkt. 2119-10 (Strong Dep., p. 245) (testifying that he does not believe that an AWMP is permission to apply a certain amount of phosphorus into the environment within the State of Oklahoma); Dkt. 2119-14 (Tolbert Dep., p. 222) (" . . . I think there's no permit that's issued in the poultry context. So I don't know that you could say [land application of poultry waste in the IRW] is somehow expressly allowed"); Dkt. 2119-8 (Gunter Dep., p. 179) ("[A] plan is not rote, thou shalt do this, that shalt do this and you'll never have a problem. A plan is just exactly what it says. It's a plan. Here's guidelines. Here's things you need to take into consideration. . . ."); Dkt. 2119-9 (Parrish Dep., p. 152) ("These plans provide guidance of how they should use their poultry waste, and then there are other guidance they should also refer to besides these plans").

Moreover, it was confirmed time and time again in Defendants' depositions of the State's witnesses that compliance with an AWMP does not necessarily equate to full compliance with the requirements of Oklahoma law regarding protecting the environment from runoff and pollution from poultry waste (although, of course, failure to comply with an AWMP would equate to a failure to comply with Oklahoma law). *See, e.g.*, Resp. to Facts, ¶ 19 (Dkt. 2119-10 (Strong Dep., pp. 211 & 220) (agreeing that a farmer can get a nutrient management plan and comply with that nutrient management plan and still be violating the law because there can be site-specific runoff from his application of poultry waste); *See* Dkt. 2119-6 (Littlefield Dep., p. 107) ("I wouldn't say that [following an AWMP] protects [the natural resources of the State]. I think that is a source is designed to protect. I -- I like the wording designed. I think that yes, it will help, but I don't think it's the whole -- the whole answer"); Dkt. 2119-8 (Gunter Dep., pp. 175-78 & 180-81) (testifying that compliance with an AWMP does not necessarily equate to compliance with the law); Dkt. 2119-9 (Parrish Dep., p. 140) ("There are more regulations than just the plan"); Dkt. 2119-9 (Parrish Dep., pp. 152-53) ("I can give you a whole list of things they have to -- in addition to [following the AWMP] that they have to adhere to . . .").

And finally, AWMPs are not issued by the State or approved by the State. *Cf.* 2 Okla. Stat. § 10-9.7(C) (simply requiring that poultry feeding operations have an AWMP). AWMPs are written for the NRCS and the poultry grower. *See* Resp. to Facts, ¶ 19 (Ex. 3 (Gunter Dep., pp. 82-83)). While persons under contract with the ODAFF do write some of the AWMPs pursuant to a federal grant, they are not being written by ODAFF, but rather "as though [ODAFF] were an NRCS field office." *See* Resp. to Facts, ¶ 19 (Ex. 3 (Gunter Dep., 81:11-82:16) Ex. 4 (Parrish Dep., pp. 64-66); *see also* Ex. 3 (Gunter Dep., pp. 243-44)).



Simply put, the dictates of Oklahoma law are clear and unequivocal: it is forbidden for land-applied poultry waste to run off, to create an environmental or public health hazard, or to result in contamination of the waters of the State. *See* 2 Okla. Stat. § 10-9.7. Possession of an AWMP does not authorize or permit a person to violate those dictates. Rather, an AWMP is simply a guidance document to assist in complying with these dictates -- although compliance with an AWMP alone does not ensure to compliance with the law. Indeed, if a person cannot comply with the requirements of the RPFO Act not to have run-off and not to pollute, the solution is not to land apply the poultry waste.

**2. There is no conflict between 27A Okla. Stat. § 2-6-105(A) & 2 Okla. Stat. § 2-18-1(A) and the RPFO Act, and compliance with the RPFO Act is not an impossibility**

Given that an AWMP is unequivocally *not* a permit, approval or authorization to land apply poultry waste, it is clear that, rather than there being a conflict between 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18-1(A) and the RPFO Act, these three Acts are in perfect harmony. Both 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18-1(A) prohibit causing pollution. So does the RPFO Act. *See* 2 Okla. Stat. § 10-9.7. Under the RPFO Act, as noted above, if poultry waste cannot be applied in compliance with the requirements that there be no run-off and no pollution, the way to comply with the RPFO Act is simple: do not land apply. Thus, compliance with the RPFO Act is not an impossibility. Nothing in the RPFO Act requires land application where it will result in runoff or pollution -- in fact, the Act prohibits it. Finally, there is nothing unconstitutionally vague about any of these three Acts -- the standards are all well-defined. In sum, all of Defendants' arguments regarding Count 8 fail due to Defendants' fundamental misunderstanding of the RPFO Act.

**E. The State can establish the elements of its claims under Count 8**

The State has asserted multiple violations of the RPFO Act and its regulations under Count 8, including: (1) that land-applied poultry waste "create[s] an environmental or public health hazard," *see* 2 Okla. Stat. § 10-9.7(B)(4)(a); (2) that land-applied poultry waste "result[s] in the contamination of waters of the state," *see* 2 Okla. Stat. § 10-9.7(B)(4)(b); (3) that there is "runoff of waste from the application site," *see* 2 Okla. Stat. § 10-9.7(C)(6)(c); (4) that there is "[r]unoff of poultry waste from the application site," *see* Okla. Admin. Code § 35:17-5-5(a)(7)(C); (5) that "land application of poultry waste . . . cause[s] . . . runoff of significant pollutants to waters of the State," *see* Okla. Admin. Code § 35:17-5-5(c) and (6) that "land application of poultry waste . . . cause[s] a water quality violation to waters of the State," *see* Okla. Admin. Code § 35:17-5-5(c).<sup>6</sup> In response, Defendants argue that with respect to (4) and (5) above (and those two sections alone), the State cannot establish the elements of these violations because the State cannot establish "runoff" of "poultry waste" because the term "runoff" (as defined in the regulation) purportedly pertains only to the runoff of *intact* pieces of poultry waste and not to the constituent parts (*e.g.*, phosphorus and bacteria) of poultry waste. This argument fails for multiple reasons.

First, the argument is a wholly illogical interpretation of the terms used in the regulatory scheme,<sup>7</sup> as such an interpretation would defeat the purpose of the RPFO Act and its regulations. *See, e.g., Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with

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<sup>6</sup> The State is not pursuing a claim in Count 8 for discharge under 2 Okla. Stat. § 10-9.7(B)(1), and therefore Defendants' argument regarding this provision is moot.

<sup>7</sup> The RPFO Act defines "poultry waste" as "poultry excrement, poultry carcasses, feed wastes or any other waste associated with the confinement of poultry from a poultry feeding operation." 2 Okla. Stat. § 10-9.1(B)(21). The RPFO Act does not define the term "runoff." The RPFO Act regulations define "runoff" as "any release by leaking, escaping, seeping, or leaching of poultry waste into waters of the State." Okla. Admin. Code § 35:17-5-2.

a view to their place in the overall statutory scheme"). The purpose of the RPFO Act and its regulations is "to control nonpoint source runoff and discharges from poultry waste application of poultry feeding operations." *See* Okla. Admin. Code § 35:17-5-1. Poultry waste, including poultry excrement, is simply the sum of its constituents. The environmental problem presented by nonpoint source runoff of poultry waste is the constituents of that poultry waste, including the constituents of the excrement. Were this not so, there would be no purpose in doing analyses of poultry waste, in doing soil tests, in designating watersheds as "nutrient limited," etc.

Second, Defendants' reading fails to give meaning to all of the words used in the regulatory definition of "runoff." The definition of "runoff" includes the terms "leaching" and "seeping" of poultry waste. Okla. Admin. Code § 35:17-5-2. "Leach" means "to dissolve out by the action of a percolating liquid." *Merriam Webster's Collegiate Dictionary* (10th ed.). "Seep" means "to flow or pass slowly through fine pore or small openings." *Id.* The use of these two terms makes clear that the definition of "runoff" is not limited solely to *intact* pieces of excrement. Rather, these two terms by their very definitions are referring to the *constituents* of poultry waste, because those, of course, are what would leach or seep.

And third, Defendants' reading fails to give meaning to all of the words used in the statutory definition of "poultry waste" that is incorporated into the regulations. The definition of "poultry waste" includes the phrase "*or any other waste* associated with the confinement of poultry from a poultry feeding operation." *See* 2 O.S. § 10-9.1(B)(21) (emphasis added). "The use of the word 'any' within a statute is equivalent and has the force of 'every' and 'all.'" *State ex. Rel Porter v. Ferrell*, 959 P.2d 576, 578 (Okla 1998). By use of this phrase, the legislature clearly intended to include all forms and parts of waste from poultry operations -- even if it was not fully intact pieces of excrement. Simply put, the constituents of poultry waste fall within the

definition of "runoff." Therefore, the RPFO Act and its regulations apply to, *inter alia*, the phosphorus and bacteria contained in poultry waste, and runoff of these constituents is a violation of the RPFO Act and its regulations. Defendants' Motion must therefore be denied.

Moreover, even if Defendants' bizarre "intact-pieces-of-poultry-excrement" interpretation were applicable, Dr. Caneday testified that he witnessed massive amounts of poultry waste flowing from a field toward the Illinois River during heavy rain. *See* Resp. to Facts, ¶ 25 (Dkt. 2103-11, Caneday P.I. Test., pp. 597-99). In addition to Dr. Caneday's testimony, there has been ample evidence presented in this case that demonstrates that poultry waste is polluting the waters of the State. *See* Resp. to Facts, ¶¶ 24-25.

Thus, Defendants' Motion as to violations of Okla. Admin. Code § 35:17-5-5(a)(7)(C) and Okla. Admin. Code § 35:17-5-5(c) ("runoff of significant pollutants") fails, even applying their extreme interpretation of the statute.

Defendants also present a brief argument that they are entitled to summary judgment on Count 8 because the State has allegedly permitted, approved or authorized specific instances of land application of poultry waste, citing to their arguments on pp. 17-22 of their Motion. *See* Motion, p. 24. As explained *supra*, pp.22-24, the State does not permit, approve or authorize specific instances of land application of poultry waste. An AWMP is not permission or approval to apply poultry waste, and possession of an AWMP does not authorize or permit a person to violate the requirements of the RPFO Act. Thus, Defendants' argument fails.

**F. There is an issue of fact as to whether Defendants have violated the Oklahoma state statutes at issue in Counts 7 and 8.**

Defendants argue that they are entitled to summary judgment because the State has not offered evidence of the violations alleged in its statutory claims. *See* Motion, p. 25. Defendants are simply incorrect. With respect to its claims under 27A Okla. Stat. § 2-6-105(A) and 2 Okla.

Stat. § 2-18.1 (Count 7), the State can show that most of the poultry waste generated by each Defendants' respective birds is land applied in the IRW in very close proximity to where it is generated, *see* Resp. to Facts, ¶¶ 11 & 16; that this poultry waste has been over-applied in the IRW, *see* Resp. to Facts, ¶ 24; that some of this poultry waste *always* runs off from the fields in the Oklahoma portion of the IRW where it has been land applied, *see* Resp. to Facts, ¶¶ 24-25; and that this poultry waste runoff is not only likely to cause pollution of Oklahoma's waters, it is causing pollution of Oklahoma's waters, *see* Resp. to Facts, ¶ 7, 24-25. *See also* State's Motion for Partial Summary Judgment, Dkt. 2062; Response to Defendants' Motion for Partial Summary Judgment on Defendant Specific Causation. This evidence makes out a violation of 27A Okla. Stat. § 2-6-105(A) and 2 Okla. Stat. § 2-18.1 as to each Defendant.<sup>8</sup>

This same evidence suffices to make out violations of the RPFO Act as to *each* land application of poultry waste in the Oklahoma portion of the IRW.<sup>9</sup> Moreover, there is also direct evidence in the record of violations of the RPFO Act by Defendants and their growers (for which, as explained above, they are liable) in the IRW. *See supra*, Resp. to Facts, ¶¶ 20 & 26. In sum, Defendants' argument on this point is legally and factually wrong, and, as such, fails.

## V. Conclusion

WHEREFORE, in light of the foregoing, Defendants' Motion should be denied in its entirety.

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<sup>8</sup> The State may demonstrate that Defendants have violated the statutes at issue by circumstantial evidence. *See, e.g.,* *Tosco Corp. v. Koch Indus.*, 216 F.3d 886, 892 (10th Cir. 2000); *Ohio Oil Co. v. Elliott*, 254 F.2d 832, 834 (10th Cir. 1958); *Mid-Continent Petroleum Corp. v. Miller*, 79 P.2d 804, 805 (Okla. 1938); *King v. State*, 109 P.2d 836, 838 (Okla. Crim. App. 1941); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 163 (4th Cir. 2000) (*en banc*).

<sup>9</sup> *See especially* Resp. Facts, ¶ 19 (Dkt. 2119-9 (Parrish Dep. p. 94); Dkt. 2119-18 (Chaubey Dep. p. 168); Dkt. 2103-4 (p. CARTP 000009 [filed under seal])).

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
ATTORNEY GENERAL  
Kelly H. Burch OBA #17067  
ASSISTANT ATTORNEYS GENERAL  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

/s/Robert A. Nance

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page OBA #6852  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis W. Bullock OBA #1305  
Robert M. Blakemore OBA 18656  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 707  
Tulsa OK 74119  
(918) 584-2001

Frederick C. Baker  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold  
(admitted *pro hac vice*)  
Ingrid L. Moll  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676

Jonathan D. Orent  
(admitted *pro hac vice*)  
Michael G. Rousseau  
(admitted *pro hac vice*)  
Fidelma L. Fitzpatrick  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

Attorneys for the State of Oklahoma

**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of June, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly H. Burch, Assistant Attorney General

fc\_docket@oag.state.ok.us  
kelly\_burch@oag.state.ok.us

M. David Riggs  
Joseph P. Lennart  
Richard T. Garren  
Sharon K. Weaver  
Robert A. Nance  
D. Sharon Gentry  
David P. Page

driggs@riggsabney.com  
jlennart@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com  
rnance@riggsabney.com  
sgentry@riggsabney.com  
dpage@riggsabney.com

RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS

Louis Werner Bullock  
Robert M. Blakemore  
BULLOCK, BULLOCK & BLAKEMORE

lbullock@bullock-blakemore.com  
bblakemore@bullock-blakemore.com

Frederick C. Baker  
Lee M. Heath

fbaker@motleyrice.com  
lheath@motleyrice.com

Elizabeth C. Ward  
Elizabeth Claire Xidis  
William H. Narwold  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC  
**Counsel for State of Oklahoma**

lward@motleyrice.com  
cxidis@motleyrice.com  
bnarwold@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

Robert P. Redemann  
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

rredemann@pmrlaw.net

David C. Senger

david@cgmlawok.com

Robert E Sanders  
Edwin Stephen Williams  
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.**

John H. Tucker  
Theresa Noble Hill  
Colin Hampton Tucker  
Kerry R. Lewis  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
thill@rhodesokla.com  
ctucker@rhodesokla.com  
klewis@rhodesokla.com

Terry Wayen West  
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
Todd P. Walker  
Christopher H. Dolan  
Melissa C. Collins  
Colin C. Deihl  
Randall E. Kahnke  
FAEGRE & BENSON, LLP

dehrich@faegre.com  
bjones@faegre.com  
kklee@faegre.com  
twalker@faegre.com  
cdolan@faegre.com  
mcollins@faegre.com  
cdeihl@faegre.com  
rkahnke@faegre.com

Dara D. Mann  
MCKENNA, LONG & ALDRIDGE LLP

dmann@mckennalong.com

**Counsel for Cargill, Inc. & Cargill Turkey Production, LLC**



James Martin Graves  
Gary V Weeks  
Woody Bassett  
K. C. Dupps Tucker  
Earl Lee "Buddy" Chadick  
Vincent O. Chadick  
BASSETT LAW FIRM

jgraves@bassettlawfirm.com  
gweeks@bassettlawfirm.com  
wbassett@bassettlawfirm.com  
kctucker@bassettlawfirm.com  
bchadick@bassettlawfirm.com  
vchadick@bassettlawfirm.com

George W. Owens  
Randall E. Rose  
OWENS LAW FIRM, P.C.

gwo@owenslawfirm.com  
rer@owenslawfirm.com

**Counsel for George's Inc. & George's Farms, Inc.**

A. Scott McDaniel  
Nicole Longwell  
Philip Hixon  
Craig A. Merkes  
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com  
phixon@mhla-law.com  
cmerkes@mhla-law.com

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC

sbartley@mwschw.com

**Counsel for Peterson Farms, Inc.**

John Elrod  
Vicki Bronson  
P. Joshua Wisley  
Bruce W. Freeman  
D. Richard Funk  
CONNER & WINTERS, LLP

jelrod@cwlaw.com  
vbronson@cwlaw.com  
jwisley@cwlaw.com  
bfreeman@cwlaw.com  
rfunk@cwlaw.com

**Counsel for Simmons Foods, Inc.**

Stephen L. Jantzen  
Paula M. Buchwald  
Patrick M. Ryan  
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com  
pbuchwald@ryanwhaley.com  
pryan@ryanwhaley.com

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Thomas C. Green  
Gordon D. Todd  
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com  
jjorgensen@sidley.com  
twebster@sidley.com  
tcgreen@sidley.com  
gtodd@sidley.com

Robert W. George  
L. Bryan Burns  
Timothy T. Jones  
TYSON FOODS, INC

robert.george@tyson.com  
bryan.burns@tyson.com  
tim.jones@tyson.com

Michael R. Bond  
Erin W. Thompson  
Dustin R. Darst  
KUTAK ROCK, LLP

michael.bond@kutakrock.com  
erin.thompson@kutakrock.com  
dustin.darst@kutakrock.com

**Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.**

R. Thomas Lay  
KERR, IRVINE, RHODES & ABLES  
Frank M. Evans, III  
Jennifer Stockton Griffin  
David Gregory Brown  
LATHROP & GAGE LC

rtl@kiralaw.com  
fevans@lathropgage.com  
jgriffin@lathropgage.com

**Counsel for Willow Brook Foods, Inc.**

Robin S Conrad  
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton  
HOLLADAY, CHILTON AND DEGIUSTI, PLLC

gchilton@hcdattorneys.com

**Counsel for US Chamber of Commerce and American Tort Reform Association**

D. Kenyon Williams, Jr.  
Michael D. Graves  
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON

kwilliams@hallestill.com  
mgraves@hallestill.com

**Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.**

Richard Ford  
LeAnne Burnett  
CROWE & DUNLEVY

richard.ford@crowedunlevy.com  
leanne.burnett@crowedunlevy.com

**Counsel for Oklahoma Farm Bureau, Inc.**

Kendra Akin Jones, Assistant Attorney General  
Charles L. Moulton, Sr Assistant Attorney General

Kendra.Jones@arkansasag.gov  
Charles.Moulton@arkansasag.gov

**Counsel for State of Arkansas and Arkansas National Resources Commission**

Mark Richard Mullins  
MCAFEE & TAFT

richard.mullins@mcafeetaft.com

**Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen**

Mia Vahlberg  
GABLE GOTWALS

mvahlberg@gablelaw.com

James T. Banks  
Adam J. Siegel  
HOGAN & HARTSON, LLP

jtbanks@hhlaw.com  
ajsiegel@hhlaw.com

**Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation**

John D. Russell  
FELLERS, SNIDER, BLANKENSHIP, BAILEY  
& TIPPENS, PC

jrussell@fellerssnider.com

William A. Waddell, Jr.  
David E. Choate  
FRIDAY, ELDREDGE & CLARK, LLP  
**Counsel for Arkansas Farm Bureau Federation**

waddell@fec.net  
dchoate@fec.net

Barry Greg Reynolds  
Jessica E. Rainey  
TITUS, HILLIS, REYNOLDS, LOVE,  
DICKMAN & MCCALMON

reynolds@titushillis.com  
jraine@titushillis.com

Nikaa Baugh Jordan  
William S. Cox, III  
LIGHTFOOT, FRANKLIN & WHITE, LLC

njordan@lightfootlaw.com  
wcox@lightfootlaw.com

**Counsel for American Farm Bureau and National Cattlemen's Beef Association**

Duane L. Berlin  
LEV & BERLIN PC

dberlin@levberlin.com

**Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research**

Also on this 5<sup>th</sup> day of June, 2009 I mailed a copy of the above and foregoing pleading to:

**Thomas C Green** -- via email: tcgreen@sidley.com  
Sidley, Austin, Brown & Wood LLP

**Dustin McDaniel**  
**Justin Allen**  
Office of the Attorney General (Little Rock)  
323 Center St, Ste 200  
Little Rock, AR 72201-2610

**Steven B. Randall**  
58185 County Rd 658  
Kansas, Ok 74347

**Cary Silverman** -- via email: csilverman@shb.com  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)

\_\_\_\_\_  
/s/Robert A. Nance